FILED,
MAR 16 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 229.

THE INLAND AND SEABOARD COASTING COMPANY AND HENRY A. WILLARD, JOHN W. THOMPSON, SAMUEL NORMENT AND J. H. BAXTER, Plaintiffs in Error,

vs.

FRANCIS A. TOLSON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

W. D. DAVIDGE,
NATHL. WILSON,
Counsel for Plaintiffs in Error.

Press of McGill & Wallace, 1107 E Street N.W., Washington, D. C.

[Marginal:] 12 Stats., 763.

AN ACT to reorganize the courts in the District of Columbia, and for other purposes.

* * * * * * *

SEC. 6. *And be it further enacted*, That the said Court, in general term, shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made.

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vs.

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In Error to the Supreme Court of the District of Columbia.

Brief for Plaintiffs in Error.

STATEMENT.

The defendant in error, plaintiff below, sued the Inland and Seaboard Coasting Company, a plaintiff in error and the defendant below, to recover damages alleged to have been sustained by reason of the negligent management of one of the steamboats of the defendant at the wharf of the plaintiff, whereby the wharf was damaged and the plaintiff thrown against one of the piles and his left foot crushed between the pile and other timbers of the wharf. (Record, p. 1.)

A verdict was rendered by the jury for the sum of $8,000, and judgment was entered thereon. (Record, pp. 6, 7.)

Thereupon the defendant filed its motion for a new trial on exceptions taken at the trial, and filed an undertaking on appeal from the judgment to the General Term, with J. W. Thompson, H. A. Willard, Samuel Norment, and J. H. Baxter as sureties. (Record, pp. 7, 8, 9.)

On the 11th of July, 1887, the Court in General Term rendered its judgment of affirmance against the defendant and sureties. (Record, p. 88.)

The plaintiff below was the owner of a wharf or pier in the Potomac river, about two hundred and twenty-seven yards from the Virginia shore, where he also owned a farm upon which he resided. (R., 11.) The wharf was built by the plaintiff in the early part of 1883, at the cost of one hundred and twenty-five or one hundred and thirty dollars. (R., 18.) The front of it was parallel with the channel of the river and about twelve feet in length. (R., 23, 53.) The rear was about twenty-eight or thirty feet long and the sides about twenty-eight feet. (R., 11, 53.) It was built on piles driven into the bed of the river, and on these stringers, eight or ten inches square, were laid. (R., 53.) Upon these stringers was nailed or spiked the flooring, which was composed of chestnut planks about two inches thick and eight or ten inches wide, laid parallel with the front. (R., 53.) At each corner of the front were three spring or fender piles, from fifteen to seventeen inches in diameter and in height four or five feet above the floor of the wharf. These piles were driven close to the wharf but were not fastened in any manner to it. (R., 19, 53.)

Of these piles at each corner, one was directly at the corner in the crotch formed by the projection of the front and side stringers; another was in the front and distant from the first about a foot and nine inches, and the third was on the side and the same distance from

the first. Three or four feet from each corner was a snubbing post or capstan to make fast the lines of vessels stopping at the wharf. (R., 23, 53.)

The plaintiff was the wharfinger and had been engaged in that calling since 1871. (R., 20, 44.)

The wharf was open to the public, and the steamboats plying in the river landed at the wharf when signalled. (R., 11, 20.)

The plaintiff received and shipped passengers and freight for hire—that is, a commission of ten per cent. of the freight paid steamboats. (R., 20.)

The only communication with the shore was by means of a row-boat managed by the plaintiff.

On the 15th of September, 1883, the day of the accident, the plaintiff received on shore a small basket containing pears and an empty demijohn to be shipped to Washington. (R., 12, 13.) Between twelve and one o'clock he saw the steamer *John W. Thompson* coming up the river, and placing these articles in his boat he took them out to the wharf. He there made out a manifest of them on a piece of paper and awaited the coming of the steamer. The day was perfectly calm and the water smooth with a flood-tide. (R., 13.) He failed to give the customary signal to stop—hoisting a pole with a flag—and in consequence the steamer was passing the wharf, and her bow already beyond it when he waived the manifest and hailed her to stop, as he had some articles to send up. (R., 13, 14, 57, 58.) The steamer was then out in the stream some twenty or thirty yards from the front of the wharf. On receiving the notice, the captain of the steamer took the necessary steps to make a stern-landing. He backed the vessel, throwing out his bow to the right, and the tide gradually bore him to the wharf, and she struck the piles of the lower corner with more or less force. At this point the evidence divides into contradictory branches.

That of the plaintiff is to the effect that he was attending to his duty as wharfinger and standing near the snubbing post, and about three feet from the front of the wharf ready to catch the lines so as to make fast, and that while he was in that position the vessel struck the lower piles with such violence that part of the front plank of the wharf was split off and several other planks jammed and torn up, and his left foot was caught between the planks and the post and badly crushed. Diametrically opposed to this is the evidence of the defendant. It is that as the vessel neared the wharf, the plaintiff, having a basket on his left arm and a demijohn in his left hand, approached the front of the wharf and called to the mate, who was ready to throw the lines to make fast, "We don't want a line; I have got nothing but a demijohn and a basket," and stretched out his left arm to the mate who, standing in the vessel inside the after gangway rail, and who reached over and took the basket and demijohn and set them down on the deck (R., 54, 55), and sang out, "All right," the signal to go ahead; that at this time the vessel had not touched the lower piles but was approaching them; that after the above articles were delivered the plaintiff, with his right arm and leg around one of the piles, and reaching over, shook hands with the mate and indulged in jocular remarks; and whilst so engaged the vessel struck the lower piles, but not with unusual violence, and the left foot of the plaintiff was caught between the flooring of the wharf and one of the piles. Two witnesses, who were on the deck of the steamboat, Captain Gibbon of the U. S. Army and Henry T. Ennis, watched the whole proceeding, observed the pained expression of the plaintiff's face when his foot was held fast, heard his exclamation of distress, and saw him, when the upward movement of the vessel relieved

the pressure upon the pile, draw from behind it his wounded foot. (R., 54, 55, 69.) After the accident the vessel proceeded on her way a short distance, when the plaintiff recalled her by his cries for help, and she returned. Several of her men conveyed the plaintiff to his home on the shore. When ashore he admitted to these men that he was hurt through his own carelessness and entirely exonerated those in charge of the vessel, and the following day he made the same declaration to his neighbors who called to see him. (R., 69.)

This suit was not brought until the 11th of March, 1884, and no claim was made by the plaintiff for compensation until after the employment of attorneys, when a demand was made by them in behalf of the plaintiff. (R., 42, 43.)

At the trial, the instructions prayed by the plaintiff (Rec., pp. 76, 77) were granted by the Court (Rec., p. 79), and the defendant excepted.

Instructions were also prayed by the defendant, some of which were given and others refused, and the refusal excepted to. (Rec., p. 79.)

The Court charged the jury at length (Rec., pp. 79–83), and portions of the charge was excepted to. (Rec., pp. 84–88.)

It is proposed to submit only the more conspicuous errors into which, it is submitted with deference, the Court below fell.

Assignment of Errors.

The Court erred:

First. In granting the third instruction prayed by the plaintiff, as follows:

"If the jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that in making the landing in question

the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, this *would be prima facie evidence of negligence* on the part of the agents of defendant under the circumstances in making such landing, and would justify the jury in so finding, *unless upon the whole evidence such prima facie evidence is rebutted.*"

Record, p. 76.

Second. In granting the fourth instruction prayed by the plaintiff, as follows:

"In determining whether the defendant's agents were guilty of negligence in making the landing in question, it would be proper for the jury to consider with the other facts and circumstances shown in evidence whether, under all the circumstances, it was dangerous to make a rear landing with that boat at that time at the wharf in question, and whether either the pilot or captain should not have been in the pilot-house during the making of said landing, and if they find from all the evidence that it was dangerous to make such landing under such circumstances this will be *prima facie evidence of negligence on the part of defendant* to justify them in so finding, *unless such evidence is rebutted* by the whole evidence in the cause."

Record, pp. 76, 77.

Third. In refusing the seventh instruction prayed by the plaintiff, as follows:

"If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff placed his left foot between the piles of said pier and the flooring of said pier or between one of the piles in front of said pier and the flooring thereof and allowed it to remain there while the boat was departing from said pier, and the foot so placed there was injured while in that position, then the plaintiff is not entitled to recover in this action."

Record, p. 78.

Fourth. In qualifying, by the charge, the sixth (erro-

neously called the seventh, R., 81) instruction prayed by the defendant and given by the Court, so as to nullify the said instruction or render it valueless, as follows:

"The principal ground of negligence, however, as I understand it, that is insisted upon by the defendant as contributing to the injury, was the plaintiff's placing his foot in a dangerous position on the wharf when he must have known that the effect of the boat striking would be to crush his foot.

"The seventh instruction of the defendant, granted by the Court, presents that view of the case on behalf of the defendant in its full force.

"That instruction is as follows:

"7. If the jury shall find from the whole evidence that at the time the defendant's boat was landing at the pier Shamrock the plaintiff *negligently* or carelessly placed his left foot between the piles of said pier or between the piles and the flooring of said pier or between one of the piles in front of said pier and the flooring thereof and allowed it to remain there while the boat was departing from said pier and the foot so placed was injured while in that position, then the plaintiff is not entitled to recover in this action.

"*This is the only instruction in which I have undertaken to say to the jury what act of the plaintiff would disentitle him from recovering.*

"This is upon the hypothesis that you shall first find the *facts* spoken of and then that the plaintiff *negligently and carelessly* placed his foot in the position referred to. It, however, *still leaves with you the question, if you should find he did place his foot in such position, whether or not his act in doing that was such negligence as would disentitle him from recovering.*

"There is a principle which you will bear in mind in regard to that. It is this: That a person in the position of the plaintiff is to keep his wits about him—to be on the alert—so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged. For instance, a man should be more cautious if he is running a dangerous engine than if he is sitting, as you are now, in a

position of safety and attending to his usual avocation. His care must be in proportion to the hazard of his engagement.

"There is *no proof here* to show that this was a dangerous vocation—standing there attending to that wharf—and yet, nevertheless, there were certain hazards accompanying it, just as there are in almost all positions. *One of you, for instance, might lean over in your chair in such a way as to fall and cut your head, but it is not likely that you will.*"

Record, pp. 78, 79, 81, 82.

Fifth. In charging, in the absence of any evidence, as follows:

"There is a difference of recollection on the part of the various witnesses as to whether this boat struck the pier when it was backing or going forward, and also a difference as to whether this basket, and, possibly, the demijohn, was handed over before the boat struck the pier in coming back. You are to consider that in this point of view: If you should find that all the business that Tolson had with that boat had been transacted before the boat struck the pier, and *the boat had left the position in which it was when those articles were thus delivered*, then you are to take into consideration whether Tolson was *obliged to conclude that the boat, having done its business at the wharf, was likely to come again and touch the wharf.* If the condition of things was such that the probability was that it would, then, of course, more caution would reasonably be expected to be exercised to get into a safe position *than if he had reason to suppose that, having transacted all its business, the boat would return no more to the wharf.*"

Record, pp. 85, 86.

Sixth. In taking from the jury the determination of the question, whether the plaintiff was entitled to credit, as follows:

"Something has been said on both sides as to the weight which is to be given to Tolson's statements made here of what passed, and as to Tolson's statements said

to have been made to Mr. Grimes and others. It may, at first, seem surprising that a man who himself wears the shoe should not be able to tell where it pinches; that a man who has his foot crushed should not necessarily know better than any other party where it was hurt, and how it was hurt, and yet it is not an uncommon thing for other men who saw the thing done, to be able to tell better than the man himself how the accident happened. The shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that it was his intention to mislead. *You are, therefore, to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view.* He may not be the best witness as to what did happen to himself or the manner in which the thing may have happened."

Record, p. 86.

Seventh. In charging, in the absence of any evidence, that, even if there was contributory negligence on the part of the plaintiff, he was entitled to recover if the defendant, by the exercise of ordinary care, could have avoided the effect of such negligence, as follows:

"There is one qualification of this rule of negligence which it is proper I should mention. Although the rule is that even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant and disentitle the plaintiff from recovering *if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.* I believe I have given in your presence an illustration of this principle, but I will repeat it here: If, for instance, a person driving a coach very rapidly up Pennsylvania avenue runs over a man

not looking about him, that would be supposed to be negligence; but if it turned out that if the party whom he run over was lying in the roadway drunk, that would be contributory negligence on the part of the man, and he would not be entitled to recover in this action. There is this qualification, however, notwithstanding the fact that the man was lying in the roadway drunk: If the man driving the coach *saw him there, and could by the exercise of ordinary care and diligence have avoided running over him, and did not do it, he cannot shelter himself behind the plea of contributory negligence on the part of the other party.*"

R., 86.

Eighth. In refusing to give the third prayer of the defendant, as follows:

"In order to entitle the plaintiff to recover in this action, it is incumbent on the plaintiff to prove to the satisfaction of the jury that in approaching and landing at the plaintiff's wharf, at the time described in the declaration, the defendant did not exercise reasonable care and skill, and also that the plaintiff did, while said boat was approaching and landing at and departing from said pier, exercise the care and prudence that a prudent and careful man, acquainted with the business of a wharf agent, and the dangers of that situation, would have exercised under similar circumstances."

Record, pp. 77, 78.

Ninth. In rejecting the evidence of Captain Bonneville, as to whether a position within two or three feet from the fender piles of the wharf was a safe place for a wharfinger to stand when a boat was approaching to take off freight or make a landing, upon the ground that "*said Bonneville had not shown himself to be a wharfinger*," although he had an experience of "twelve years' steady, steamboating" on the Potomac river in the capacities of "wheelman, first mate, second mate, pilot, and captain." (Record, pp. 75, 71.)

Tenth. In holding that, in an action like the present—that of a wharfinger for injury to his wharf and himself, by reason of an alleged unskillful landing made by a steamboat, *when the wharf is used for hire and the steamboat invited to land—the burden of proof is upon the defendant to show negligence on the part of the plaintiff, and that it contributed to the injury, as follows:*

"The jury are instructed that the burden of proof to establish contributory negligence in the plaintiff is upon the defendant in this case."

Plaintiff's 6th prayer granted (Rec., pp. 77, 79); also Charge (Rec., p. 85); defendant's 3d prayer rejected. (Rec., pp. 77, 79).

POINTS AND ARGUMENT.

I. The First Assignment of Error.

The predicate of the right to recover was negligence on the part of the defendant, causing the alleged injury. This was the maini ssue, and it was the legal right of the defendant to have it determined by the jury.

Such negligence depended upon all the facts and circumstances in evidence bearing upon the subject.

It was for the jury to determine to what weight these facts and circumstances were entitled.

Instead of allowing the jury to do this the Court singled out of the mass of testimony two facts—one, "that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed;" the other, that "the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring;" and instructed the jury that these facts constituted *prima facie* evidence of negligence. Such an instruction plainly invaded the province of the jury by assigning to particular facts a weight which it was the right and duty of the jury, and not of the Court, to determine.

Thus the issue which was presented by the pleadings was by the act of the Court taken from the jury, and a new issue substituted. The former was the broad issue of negligence; the latter, the two facts, and then whether there was sufficient evidence to rebut the presumption established by the ruling.

Under the pleadings the burthen of proof was upon the plaintiff to show negligence. Under the ruling, two facts being found, that burthen ceased as to the plaintiff and was shifted to the defendant, who was required to repel the presumption declared to arise from those facts alone.

Moreover, the proposition involved in the instruction is not true. It is not true that because a wharf ordinarily strong was injured by a vessel in the manner described there is any presumption of law or fact that the vessel was negligent in a legal sense. Before such negligence can be asserted, it must be shown that the vessel did something which it should not have done, or omitted something which it should have done, and that *the injury was the result of such commission or omission.* In other words, the vessel is chargeable with its own acts of commission or omission, but for nothing beyond; and even within this limit of liability is responsible only for reasonable care. It is not answerable for other causes than such as it wrongfully set in motion, nor for the latter unless they involved the want of reasonable prudence, and then only for the resulting damage. And yet the instruction makes it *prima facie* responsible for all causes, and further makes such responsibility without limit or degree. Thus the instruction makes the vessel or its owner an *insurer.* The problem is this: Given an ordinarily strong wharf, followed by serious injury to it, and the conclusion is negligence. The answer is that the vessel did not guarantee that the condition of the wharf would continue as before, but was

merely bound to exercise reasonable care, and hence is responsible only for the breach of that duty.

It is not necessary to do more than call attention to the vague language of the instruction and its tendency to deceive or mislead a jury. The instruction, thus vicious in substance and form, was not in any manner qualified by the charge. While the negligence of the defendant is discussed, the means or process whereby the conclusion of negligence is to be reached, according to the instruction, remain intact, and at the end of this charge the instruction in writing is delivered to the jury. (R., 85.)

II. The Second Assignment of Error.

The error in this assignment is the same in principle as that discussed above, though greater in degree.

The proposition is that if it was dangerous to make a stern landing, and the captain or pilot should have been, during such landing, in the pilot-house and was not there, these facts create a *prima facie* presumption of negligence on the part of the defendant.

This is a repetition of the vice of the preceding instruction already discussed. It was for the jury to attach what weight they deemed proper to the facts relied on. They might or might not determine that these facts amounted to a *prima facie* case. The question was exclusively for them, and it was error for the Court to interfere with the exercise of their judgment.

Few things have been more sternly reprobated by appellate courts than the clever and ingenious devices shown by this and the preceding assignment.

As a matter of fact there was, in making the landing in question, nothing for either the captain or pilot to do in the pilot-house after the wheel had been fixed in the becket. The rudder then played no part in controlling the movements of the vessel. (R., 59, 63, 64, 67, 72,

73.) The pilot, useless in the pilot-house, stood aft the paddle-box by the bell strap, with which he could control the engine. (*Id.*)

In granting the instructions referred to in the foregoing assignments of error, one and two, the Court erroneously applied to this case the doctrine that is applicable exclusively to the duty and liability of carriers for hire to their passengers.

The fact of the happening of an accident and the infliction of an injury thereby has never been held to be *prima facie* evidence of negligence, except with reference to injuries to passengers, toward whom, as has been frequently held by this Court, carriers are bound to observe the utmost caution, and are responsible for such injuries received *in the course of their transportation* as might have been avoided by the exercise of extraordinary vigilance, aided by the highest skill.

Stokes *v.* Salstonstall, 13 P., 181.
R. R. Co. *v.* Pollard, 22 Wall., 350.
The City of Panama, 101 U. S., 463.
Penn. Co. *v.* Roy, 102 U. S., 455.

Certainly no such duties or obligations can be said to exist on the part of the owners of a steamboat to the owner or manager of a public wharf used for hire, and there can be no reason why a presumption of negligence in favor of the wharfinger should arise from the fact of an injury to the wharf.

Shearman & Redfield on Neg., sec. 516.

III. The Third and Fourth Assignments of Error.

These may be considered together. The difference between them is that the seventh instruction (R., 78) is based upon the mere fact that the plaintiff put his foot in a place manifestly unsafe and was thereby injured,

whilst the sixth (*Id.*) requires the jury to find that the plaintiff in so putting his foot acted negligently and carelessly. It is submitted that the former should have been granted; but whether it should or not, the defendant was beyond any question entitled to the latter, and so the Court seems to have thought when it gave the sixth instruction. (R., 79.)

It certainly followed as a legal conclusion that if the plaintiff acted negligently and carelessly in putting his foot in a place manifestly unsafe he could not recover for the injury which ensued.

Then what followed? In the charge the jury was instructed that not only must the conduct of the plaintiff have been negligent, but that it was for the jury to find that the negligence of plaintiff "*was such as would disentitle him from recovering.*"

Thus the question of law determined by the Court by granting the instruction was by the charge remitted to the jury for its determination, and thereby all benefit of the instruction was denied to the defendant.

This was not all. Not only was this question turned over to the jury from whom it had been taken by the instruction, but the Court proceeded substantially to instruct the jury that there was no negligence on the part of the plaintiff.

The Court charged (R., 81): "*There is no proof* here to show that this was a dangerous vocation—standing there attending to that wharf"—a proposition contradicted by the evidence and the injury, of which the plaintiff complained, as well as by daily experience.

The Court went further and drew a fine distinction between danger and "*certain hazards*" (*Id.*), in defiance of all lexicographers, and then proceeded to minimize the hazards to the lowest point by charging that they were such as accompanied almost all positions—"*One of you, for instance, might lean over in your chair*

in such a way as to fall and cut your head, but it is not likely that you will."

Bearing in mind that the instruction, as modified, left to the jury the question whether there was "such negligence as would disentitle the plaintiff from recovering," when the Court further charged that there was no evidence to show danger in the vocation, but only hazards similar to those of men sitting in their chairs in a jury box, it must be plain that the subject of negligence on the part of the plaintiff was practically eliminated from the case.

Besides, whether there was danger or not in the "vocation," to which the question was by the charge shifted, in such manner as to mislead the jury, the real question submitted by the charge was whether there was such negligence on the part of the plaintiff as would disentitle him from recovering. Vocation is one thing and the manner in which it is exercised quite another.

IV. The Fifth Assignment of Error.

The instruction given by the Court referred to in the fifth assignment of error appears to have been based upon the hypothesis or theory that the injury to the plaintiff was caused by the boat on her *return* to the wharf *after* it had transacted its business there and received on board the articles delivered by the plaintiff.

There is an utter absence of evidence on which to base this part of the charge. There is not a scintilla of proof that the vessel left the wharf and returned *before* the injury happened to the plaintiff. *After* he was hurt, and when the vessel had gone some several hundred yards up the river, she did return to render him assistance, but there is no evidence whatever tending, in the remotest manner, to show that the plaintiff might have concluded, or had any reason to conclude, that, as stated in the charge, "the boat having done its business

at the wharf was not likely to come again." Any such hypothesis is not only unsupported by any evidence, but is, moreover, contradicted by the history of the transaction as detailed by the different witnesses.

In another part of the charge the Court itself said "that the whole affair must have passed in a moment of time." (R., 82).

It is manifest error to assume the existence of material facts which there is no evidence tending to prove.

"When a prayer for instructions is presented to the court and there is no evidence in the case to support the theory of fact which it assumes, the prayer for instruction should be denied, and if given by the court it is error, as the tendency of such an instruction is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.

"It is clearly error in a court, said Chief Justice Taney in United States *v.* Breitling, to charge the jury upon a supposed or conjectural state of facts of which no evidence has been offered. Such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the charge of the court, and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead, and may induce them to indulge in conjectures instead of weighing the testimony."

Michigan Bank *v.* Elder, 9 Wall., 553–4.
Ward *v.* U. S., 14 Wall., 28.
Goodman *v.* Simonds, 20 H., 359.
United States *v.* Breitling, 20 H., 252.
R. R. *v.* Hunt, 93 U. S., 299.
Thompson on Trials, sec. 2295, and cases there cited.

V. The Sixth Assignment of Errors.

The instruction given by the Court referred to in this assignment of error invaded the province of the jury in respect to their right to determine the credibil-

ity of the plaintiff and the effect to be given to his various and contradictory statements.

The plaintiff was the principal witness on his own behalf to prove the negligence of the defendant. The defendant offered evidence tending to prove admissions by the plaintiff that his injury was caused by his own carelessness and that the defendant was not in any degree to blame therefor.

When the steamboat returned to the plaintiff's assistance and he was taken to his landing, a few moments after the accident happened, he stated to the mate and others, "that he was hurt by his own fault, and that he was standing in a dangerous position."

The morning after the injuries were inflicted, *at his own house*, he explained to two neighbors how the accident happened, and said to them "that it was his own fault and nobody elses; that he did not blame any of the boat people; that after he handed the basket of eggs and the demijohn to the mate, Webb Carpenter, he took Webb by the hand, or Webb took him by the hand, and said, come on, old boy, come, and go up with us, and he, the plaintiff, replied, no, I can't go;" that the boat had then started; that the basket and demijohn had been delivered and the bell had rung for them to go ahead, but unfortunately one of the piles—a loose pile—flew back and caught his foot; that he was leaning forward over the bunch of piles on the east or southeast corner of the wharf—the lower end of the wharf—and shaking hands and skylarking with the mate, telling him to go on and go up the river, and he saying that he could not go up that day, and in the meantime the pile flew back and caught his foot and crushed it." (R., 69.)

The Court instructed the jury as to the *weight* to be given to these statements and admissions in comparison with and with reference to his testimony at the trial.

The Court said that in the case of a man who has had his foot crushed, "the shock and pain may have the effect of rendering the man quite incapable of telling just exactly how the thing took place, so if you find the man at different times making somewhat different statements it does not at all follow that his intention was to mislead." The Court then gave the following positive direction:

"*You are therefore to look at any difference of statements that he may have made, if you believe he did make different statements, in that point of view.*"
R., 86.

If this instruction was correct with reference to the statement made by the plaintiff at the time or immediately after the injury was inflicted, it certainly was not applicable to statements made to his neighbors *the day after* the accident, which gave a more coherent, intelligible and probable explanation of the manner in which the injury was caused than was given by the testimony of any witness examined in the case.

There was no testimony whatever tending to prove that on *that* day the plaintiff was so affected by the shock and pain of the injury as to be incapable of giving a correct account of the accident.

But the instruction was plainly erroneous for other reasons.

The credibility of the plaintiff as a witness and the effect of his previous admissions were questions for the jury to determine upon the whole evidence.

It was not for the Court to tell the jury that they were to look at any difference of statement from a point of view that it was not his intention to mislead. That was an inference for the jury to draw under all the circumstances of the case, and not for the Court. The jury might have been of the opinion, and probably

would have been, unless controlled by the charge that such was his intention.

When, however, the Court goes further and says to the jury that they are to look at any difference of statements "*in that point of view*," that is, as not made with intention to mislead, the error of the charge is placed beyond the reach of doubt.

Here were reiterated statements made at different times and to different persons, whose veracity is not impeached, and all to the same effect, and these statements were diametrically opposed to the evidence of the plaintiff testifying in his own behalf.

Here was the further fact that after the injury the plaintiff made no complaint to the defendant and preferred no claim for compensation for a long time.

Certainly from these facts the jury might very properly draw the inference that the plaintiff had been seduced by the love of lucre in making a false claim and supporting it by his own incorrect statements, particularly as the witnesses to whom he made the damaging admissions were, as he might well suppose, unknown to the defendant.

VI. Seventh Assignment of Error.

The legal principle involved in this part of the charge is that the plaintiff might recover, notwithstanding his own negligence, if the defendant after becoming aware of the plaintiff's danger, could have avoided the mischief by the exercise of ordinary care.

As abstract principle, no proposition can be clearer than that the negligence of one man does not justify another in willfully or recklessly inflicting injury. There is, however, such difficulty in doubtful cases in the application of this exception to the general rule governing contributory negligence that many eminent judges and jurists have assailed the exception as

impracticable, save where the evidence tends to show the gross want of prudence on the part of the defendant.

The leading cases are, Butterfield *v.* Forrester, 11 East., 60; Davies *v.* Mann., 10 M. & W., 545; and Radley *v.* The London, &c., Co., L. R. 1 App. Cas., 754, reported in 2 Thompson on Neg., vol. 2, p. 1104, &c., and discussed at length, pp. 1155–1161 ; see also 1 Shearman and Redfield on Neg, § 99, 100, 101. It is evident that unless the exception is applied with caution its effect will be to destroy the general rule and introduce in its stead the rule of comparative negligence.

It is believed that the authorities are uniform that to enable a plaintiff to recover notwithstanding his own negligence the defendant must have had notice of the peril of the defendant, and time and opportunity, in the exercise of ordinary care and prudence, to avoid the injury.

It matters not, however, in the present case what are the precise limits of the exception. The objection to the charge is not that the exception was applied under doubtful circumstances, but that it was applied in the absence of any evidence at all.

There is no tittle of evidence that the defendant knew the peril of the plaintiff or had either time or opportunity by the exercise of any degree of care, ordinary or extraordinary, to guard against it. This is true under any possible theory as to the plaintiff's negligence. If that negligence consisted in his standing too near the edge of the wharf and that position was dangerous—the Court said it was not—the defendant had a right to assume that an experienced wharfinger would, as the vessel approached, change his position and avoid the danger. "One person is not bound to anticipate that another person will negligently expose himself or his property to injury, and is not bound to make provision

against the consequences of such negligence." (2 Thompson on Trials, 1157.)

If, as was the fact, the negligence of the plaintiff consisted in placing his foot between the flooring and the fender pile, it cannot be pretended that the defendant was aware of or had any reason to suspect what the plaintiff had thus recklessly done, nor that, even if it be assumed that the defendant was aware of the negligent conduct of the plaintiff, there was either time or opportunity to guard against it by any degree of care.

The pile was between the foot and the vessel. The charge itself says, "this whole affair must have passed in a moment of time." (R., 82). The defendant by its agents was wielding a heavy steamboat not capable of instantaneous action, but sluggishly responding to the human will.

Under such circumstances every element entering into the exception was wanting. There was neither discovery of peril nor any reason to believe, or even suspect, it to exist, nor was there time nor opportunity to avoid it.

Hence, to apply the exception was to mislead the jury.

See authorities under 5th assignment.

VII. The Eighth Assignment of Error.

The instruction prayed should have been given. The only possible objection to it is that it involved the obligation on the part of the plaintiff to satisfy the jury as well of his own care and prudence as of the negligence of the defendant.

Under the special circumstances of the case this obligation was upon the plaintiff. He was, as owner and wharfinger, offering the wharf for hire to steamboats, bound to furnish a suitable structure, managed by an ordinarily careful and prudent wharfinger. The point is now fully discussed under the tenth assignment.

VIII. The Ninth Assignment of Error.

The Court refused to allow the defendant to ask one of its witnesses "if a position within two or three feet from the fender piles of a wharf constructed like the Shamrock pier was a reasonably safe place to stand when a boat was approaching in order to take off freight or make a landing." The reason assigned for this refusal was that the witness had not shown himself to be a wharfinger. (R., 75.)

The witness testified that he had had about twelve years' experience in navigating the Potomac River, as wheelman, first mate, second mate, pilot, and captain, and had been asked, without objection, "what is the proper position of a wharfinger on such a wharf as the one at Shamrock, when a vessel is approaching, to make a landing—where he should stand to be reasonably safe."

His answer, made without objection, was :

"If he expects to take a stern line he should stand on the lower corner about eight or ten feet from the corner so as to take the line around to the lower post." R., 72.

The witness was competent to give an opinion as to the subject-matter of the inquiry.

Having stated generally and without objection where the wharfinger should stand when a boat was about to land at Shamrock wharf, he certainly should have been allowed to state, with reference to the exact position which the plaintiff testified that he occupied, whether that was a reasonably safe place.

The refusal of the judge to permit this question to be asked and answered was especially injurious to the defendant, and was conspicuously erroneous, in view of the fact that when the Court came to charge the jury with reference to the plaintiff's occupation, and also with

reference to his position on the wharf, after saying to the jury that the plaintiff's "care must be in proportion to the hazard of his engagement," the positive instruction was that "*there is no proof here to show that this was a dangerous vocation—standing there attending to that wharf.*"

IX. The Tenth Assignment of Error.

It is not denied that as a general rule in actions for personal injuries the burthen of proof is upon the defendant to show contributory negligence on the part of the plaintiff.

R. R. *v.* Gladmon, 15 Wall., 401.
R. R. *v.* Horst, 93 U. S., 291.
Hough *v.* Railway Co., 100 U. S., 213, 225.

In respect of the order of proof the instinct of self-preservation may well take the place of proof. The question is more difficult whether the evidence being closed, and the question of contributory negligence controverted, and to be determined by the jury upon the whole evidence, the obligation is or is not upon the plaintiff to satisfy them by *a preponderance of evidence* that he was not in fault. It may well be contended that such obligation rests upon the plaintiff as the condition, at common law, of his right to recover. On the other hand it may be that the contrary is settled by R. R. *v.* Horst, *supra*, and R. R. Co. *v.* Mares, 123 U. S., 721, and that, as a rule, not only the burthen of proof, but the duty of showing contributory negligence by a preponderance of evidence, is upon the defendants.

Be that as it may, it is submitted that the above decisions, which only profess to lay down a general rule, are to be considered in connection with the nature and character of the cases under determination, and have no application to the present case.

Here was the owner of a wharf, himself the wharfinger, throwing it open to the public *for hire* by inviting all steamboats to land to receive and deliver merchandise and passengers. The evidence of the plaintiff is explicit that by the means of the wharf he carried on the business of receiving and delivering merchandise and passengers and received from all steamboats ten per cent. of the freight charged by them. (R., 20.)

The declaration avers a negligent landing at the wharf, whereby the steamboat struck the wharf with great violence, and thereby the wharf was injured and, by means of it, the plaintiff.

It is submitted that the plaintiff came under a special obligation for hire both as to the sufficiency of the wharf and his own conduct as wharfinger, and hence was bound to show affirmatively that the wharf was a suitable one and his own conduct without fault. He had for hire offered to all steamboats landing a suitable wharf, managed by an ordinarily careful wharfinger, and without showing the fulfillment of the duty involved in this offer was not entitled to recover.

As between employer and employee, whenever the injury occurs in the discharge of the duties of the latter the burthen of proof is upon him to show both his own care and the negligence of the employer.

Wharton on Neg., s. 428.

It will be moreover observed that the injury to the plaintiff was not direct, but by means of the wharf. According to the declaration and the plaintiff's evidence the wharf was struck with great violence and *thereby* the plaintiff was injured.

Thus the injury goes back to the wharf and could be caused by the insufficiency of the structure, including its fenders, or by the negligent landing, or caused by both causes combined.

The claim of the plaintiff is in substance that notwithstanding he furnished the thing which he was, for hire, in duty bound to furnish, that thing was negligently used by the defendant. Such is the case, and it does not differ from any other cases of hiring where the thing hired is alleged to have been negligently used. It is the natural instinct of men to take care of themselves, which imposes the burthen of proof and its weight of preponderance of evidence upon the defendant in cases of injuries to the person (R. R. *v.* Gladmon, *supra*, 407), but that principle can have no application to the case of a thing hired.

Neither can it apply to personal injuries where a special duty was imposed upon a plaintiff and in the discharge of that duty he was injured.

"The owner, lessee, or any other person having the exclusive use of a dock, pier, or wharf, receiving tolls for its use, is bound to keep it in reasonably good condition, so that as far as by the use of *ordinary care, diligence, and skill* he can make it so it shall be fit for the use of vessels and safe for all persons to enter upon who have a right of access. If the wharfinger receives tolls from the public generally, he owes this duty to the public, and is liable to any one specially injured by his neglect to fulfill it."

Shearman & Redfield in Negligence, 4th ed., sec. 725.

In conclusion, and taking the charge as a whole, it is submitted that the defendant was by the rulings of the Court below deprived of a fair trial.

These rulings, grouped together, show that injustice was done the defendant:

First. By taking the broad question of the negligence of the defendant from the jury.

First and second assignments.

Second. By throwing the burthen of proving contrib-

utory negligence upon the defendant notwithstanding the special duty of the plaintiff.

Eighth and tenth assignments.

Third. By depriving the defendant of the judgment of the jury as to inferences to be drawn from the admissions and as to the degree or standard of care and caution devolved upon the plaintiff.

Sixth, eighth, and ninth assignments.

Fourth. By denying the defendant the legal effect of contributory negligence as matter of law and fact.

Fourth assignment.

Fifth. By discharging the plaintiff or enabling the jury to discharge him from the effect of contributory negligence by means of misleading rulings having no foundation in the evidence.

Fifth and seventh assignments.

The judgment should be reversed.

W. D. DAVIDGE,
NATHL. WILSON,
Of Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
OCT 21 1889
JAMES. H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE INLAND AND SEABOARD COASTING COMPANY,
PLAINTIFF IN ERROR,
v.
FRANCIS A. TOLSON.

No. 532.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

The writ of error in this case refers to "the record and proceedings" had and to the judgment rendered by the Supreme Court of the District of Columbia in the case of "Francis A. Tolson, plaintiff, and the Inland and Seaboard Coasting Company, defendant, at law, No. 25,170."

The suit was brought by the plaintiff to recover damages for personal injuries alleged to have been inflicted by the defendant, the Inland and Seaboard Coasting Company, a corporation incorporated under and in pursuance of an act of Congress.

The judgment in that suit, entered by the Supreme

Court of the District of Columbia in special term, was as follows :

" Francis A. Tolson, plff., *v.* " Inland and Seaboard Coasting Company, Deft.	*At Law. No.* 25,170.

" Now, again, come here the parties aforesaid, in manner " aforesaid, and the same jury that was respited yesterday, " who, after the case is given them in charge, on their oath " say that they find said issue in favor of the plaintiff, and " assess his damages by reason of the premises at the sum " of eight thousand dollars, besides costs ; therefore it is " considered that the plaintiff recover against said defend- " ant eight thousand dollars for his damages in manner and " form as aforesaid assessed and $ for his costs of " suit, and have execution thereof."

An appeal from this judgment was taken to the general term by the defendant, the Inland and Seaboard Coasting Company, and an undertaking given as provided by the rules of court.

The court in general term thereupon entered the judgment which is set out on the third page of the motion to dismiss.

This judgment is entitled in the case of Francis A. Tolson, plaintiff, *v.* The Inland and Seaboard Coasting Company, defendant, at law, No. 25,170, and the judgment is that the motion for a new trial on exceptions be overruled, *and the judgment of the special term affirmed with costs.*

It further adjudges, however, " that the plaintiff *recover* " his said judgment, to wit, the sum of eight thousand dol- " lars, as of the date of *said judgment of the special term*, " and the costs as well against the *said defendant* as against " Henry A. Willard, John W. Thompson, Samuel Norment,

" and J. H. Baxter, its *sureties* on said appeal to the Court, " and have *execution* against them and each of them."

I.

It is respectfully submitted that the judgment of the general term affirming the judgment below, which was a judgment against the defendant, the Inland and Seaboard Coasting Company, for a specific sum of money, was a separate judgment againt the Inland and Seaboard Coasting Company.

The fact that the Court proceeded further to *adjudge* that the plaintiff *recover* on his *said judgment* (meaning the judgment of the special term) the amount therein named, and the costs as well against the said defendant as against his sureties and have execution against them and each of them, did not deprive the defendant of its right to a separate writ of error to the judgment that was separately against it.

There is no doubt that, in a writ of error to a joint judgment, all persons against whom the judgment is entered must join.

But the judgment against the defendant Company is *not* a joint judgment; it is a separate judgment, and it affirms a separate judgment rendered against the Company by the court in special term.

The most that can be claimed as to the adjudication by the court in general term is, that it was a separate judgment against the Company, *and also another judgment* against the sureties.

The case of Estes *v.* Trabue (128 U. S., 225), cited in the brief for the defendant in error, is no authority for the contention in the brief in support of this motion; on the contrary, it is authority for saying that if a judgment

is "distributive" and can be regarded as containing a separate judgment against a defendant who is a principal, *and, also,* a judgment against the *sureties,* the defendant against whom the judgment is entered as a principal can have his separate writ of error.

In the case referred to, the judgment of the district court was entered upon a *forthcoming bond* given in attachment proceedings, and there was only one judgment rendered in that suit. In this suit the only party to the judgment of the court holding a special term was the Company, the only party to the appeal was the Company, and the adjudication against the sureties was something quite distinct from the controversy between the plaintiff and the defendant, separate and distinct from the decision and judgment of the court on the merits of that controversy.

R.R. *v.* Johnson, 15 Wall., 8.

II.

The practice of allowing judgment on a forthcoming bond, referred to in the case of Estes *v.* Trabue above, is statutory.

Amiss *v.* Smith, 16 P., 316.

An affirmance of a judgment or decree judgment against sureties can only be rendered when there is a statutory provision authorizing it.

Hiriart *v.* Ballon, 9 P., 156.
Beall *v.* New Mexico, 16 Wall., 535.
Moore *v.* Huntington, 17 Wall., 417.
Smith *v.* Gaines, 93 U. S., 341.
Merchand *v.* Frellsen, 105 U. S., 423.

But in the present case there was no authority of law for the entry of a judgment by the court in general term.

The judgment was entered in accordance with what is believed to be a new practice under a rule of court, and the defendants had no personal knowledge that the judgment had been entered.

The motion to dismiss should be denied.

NATH'L WILSON,
for Pltff. in Error.

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CLERK.

Supreme Court of the United States

OCTOBER TERM, 1890. No. 229.

THE INLAND AND SEABOARD COASTING COMPANY AND OTHERS, PLAINTIFFS IN ERROR,

vs.

THOMAS H. TOLSON, ADMINISTRATOR OF FRANCIS A. TOLSON, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Defendant in Error.

C. C. COLE,
A. A. BIRNEY,
Counsel for Defendant in Error.

Supreme Court of the United States

October Term, 1890. No. 229.

THE INLAND AND SEABOARD COASTING COMPANY AND OTHERS, Plaintiffs in Error,

vs.

THOMAS H. TOLSON, Administrator of FRANCIS A. TOLSON, Deceased.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Defendant in Error.

Statement.

Francis A. Tolson (now deceased), plaintiff below, recovered a verdict against The Inland and Seaboard Coasting Company for damages for personal injuries received by him through a violent collision between the steamboat of the defendant company and a pier in the Potomac River upon

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IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for Defendant in Error.

Statement.

Francis A. Tolson (now deceased), plaintiff below, recovered a verdict against The Inland and Seaboard Coasting Company for damages for personal injuries received by him through a violent collision between the steamboat of the defendant company and a pier in the Potomac River upon

which he was standing, waiting to receive a line to be thrown to him from the boat. The day was perfectly calm and the water smooth with a strong flood tide. (Rec., pp. 13, 45.)

The steamboat passed the wharf, and then, upon a signal from Mr. Tolson was stopped and backed up to the wharf partly across the tide. The witnesses differed as to whether the collision was caused by the force of the engines in backing or by the flood tide carrying the boat up stream. (Rec., p. 45.)

The force of the collision, was described by the plaintiff as follows:

"She struck this wharf a terrible blow right here, and in doing so it mashed all the planks up; jammed them up and threw me forward, and before I could get out of the way, the outside pile mashed in these planks, breaking the outside plank, and a piece of it came over and caught my foot in there [indicating]." (Rec. p. 13.)

Other witnesses, passengers and employees of the boat, testified that the boat struck "with such force as to jar and alarm the passengers on said boat, and to cause persons who were lying down on benches on said boat to roll off the benches, and with such force as to knock up three or four of the planks at the front of the pier, and break off a piece of the front plank." (Rec., p. 45.)

Two of the passengers, Mrs. Fryer and Maud Small, (Rec., pp. 45, 46) corroborate the plaintiff as to the manner of his injury, and that he was caught by the broken plank. The wharf was new, having been finished only three months before the accident (Rec., p. 18), and was constructed "of large piles driven into the bed of the river, the upper ends of which said piles were cut off to recieve the four stringers that rested upon them; that upon said stringers, which were eight or ten inches square, rested the floor, which was composed of planks of oak or chestnut

eight or ten inches in width and about two inches in thickness, * * * nailed or spiked to the stringers." (Rec., p. 53.)

Neither the pilot nor captain or any person was in the wheel-house when the collision occurred. (Rec., p. 45, 53.)

There was also much testimony tending to prove that the attempt made by the boat to make a stern landing was in itself reckless and negligent under the existing conditions, and the boat should have been rounded-to so as to head the tide. (Rec., pp. 46, 48, 50, 51.)

The defendant denied everything material in the case, and claimed that there was no violent collision, and no breakage of the wharf, but that said boat "was brought gently against said pier by the tide" (Rec., p. 55), that it was not negligent to make a rear landing, and that plaintiff alone was at fault.

On this condition of the proof the plaintiff claimed:

1st. That proof of the alleged violent collision of the boat with the wharf, and the tearing up of its spiked planks, was, *in the absence of satisfactory explanation*, to be regarded as negligence.

2d. That the attempt to make a stern landing was in itself negligent.

3d. That the absence of the pilot from the pilot house and tiller wheel at the time of landing was an act of negligence, which contributed to the accident and injury.

The Alleged Errors.

The First Assignment.

The first error assigned is that the court in granting plaintiff's third prayer, told the jury, in effect, that if the wharf was ordinarily strong and good, and they should find that the steamboat was thrown against it with such

violence as to tear it to pieces, this would raise a presumption of negligence in the management of the steamboat, subject to be rebutted by any proofs.

This was but a mild statemennt of the doctrine of presumptive evidence.

This subject has been frequently before this Court. In Stokes *vs.* Salstonstall, 13 Pet., 181, where a passenger sued for personal injuries received in the upsetting of a stage coach, the court said:

> The fact that the carriage was upset and the plaintiff's wife injured are *prima facie* evidence that there was carelessness, or negligence, or want of skill in the driver.

Would not this doctrine have applied if the carriage had been driven into a house on the side of the highway with such force as to demolish it?

In another case this court said:

> A presumption of negligence from the simple occurrence of an accident seldom arises except where the accident proceeds from an act of such a character *that when due care is taken in its performance no injury ordinarily ensues from it in similar cases.*
>
> Transportation Co. *vs.* Donner, 11 Wall., 129.

It can hardly be pretended that when due care is taken in landing steamboats at wharves the crushing of the wharves ordinarily ensues.

It is stated in the brief for plaintiff in error (page 14) that this doctrine is exclusively applicable to cases of *injuries to passengers* in suits against carriers for hire. No such distinction is made by the authorities.

In a case tried in the southern district of New York it was held by Wallace, J., that negligence is to be inferred from the fact of the explosion of a boiler *whether there be any relation between the owner of the boiler and the party injured or not*

> Rose *vs.* Stephens and Condit Transportation Co., 11 Fed. R., 438.

See also—

Railroad Co. *vs.* Pollard, 22 Wall., 341.

Lilienthal's Tobacco *vs.* United States, 97 U. S., 237, 268.

The Sydney, 27 Fed. R., 123.

THE SECOND ASSIGNMENT.

The instruction involved (plaintiff's brief, p. 6) was only to the effect that the jury might consider in connection with all the other facts and circumstances in evidence, whether under the proved conditions it was dangerous to make a rear landing with that boat at that time, and whether the pilot or captain should not have been in the pilot house, and if they should find that it was dangerous to make such landing under all the conditions involved, then the fact that such landing was attempted would be *prima facie* evidence of negligence, subject to be rebutted by the whole evidence in the case.

This took nothing from the jury; left them to find every fact involved, and in effect told them only that the evidence offered that a rear landing was dangerous was to be considered by them.

THE THIRD AND FOURTH ASSIGNMENT.

These involve the defendants' sixth and seventh prayers for instruction. (Rec., p. 78.)

The seventh (refused) is in the words of the sixth, (granted), except that "negligently and carelessly," which appear in the sixth, are omitted. This was a bold attempt to transfer from the jury to the judge the question whether under all the circumstances certain assumed acts or omissions were or were not negligent. The sixth prayer left the question fairly to the jury. The assumed facts were all disputed and entirely inconsistent with the mass of testimony on both sides. There was but one witness (Capt.

Gibbon) whose testimony even suggested such conditions, and his testimony is directly opposed to that of defendant's witness Ennis (Rec., p. 55), who was standing with him when they made their observation. (Rec., p. 55).

What constitutes negligence by the party injured is a question of fact.

RR. Co. *vs.* Pollard, 22 Wall., 341.

This prayer was certainly properly refused, and this seems tacitly conceded by counsel (Brief, p. 15); but criticism is made of the expression of the court in its charge (Rec., p. 81):

> It however still leaves with you the question, if you should find he did place his foot in such position *whether or not his act in doing that was such negligence as would disentitle him from recovering.*

It is claimed that this remitted to the jury the question of what negligence would disentitle. It is to be remembered, however, that immediately before using this expression the court had told the jury (Rec., p. 80):

> If you find that the plaintiff was guilty of negligence, and that such negligence directly contributed to the injury, then it is not important to inquire how far such negligence contributed to it; *for if he contributed to it at all,* that would incapacitate the plaintiff from recovering.

The criticised explanation was made in view of this explicit direction as matter of law, and it is only cavilling to assume that it was intended to limit or could be construed to limit the force of such direction.

The charge must be taken as a whole.

Spring Co. *vs.* Edgar, 99 U. S.,a 658.

The court was entirely correct in stating there was no proof that attending to the wharf was a dangerous vocation, and the statement that it was the duty of the plaintiff "to

keep his wits about him, to be on the alert so as not to be injured, and to exercise such vigilance or care as is proportionate to the hazard of the duty in which he is engaged," (Rec., p. 81) was all that the defendant could fairly ask.

The Fifth Assignment.

There was ample evidence to justify what the court said, but counsel affect to misunderstand his meaning.

Witnesses differed as to whether the collision occurred while the boat was backing, or after it ceased to back and started forward, and also whether Tolson delivered his packages before the boat struck, or was in the act of delivering them when it struck. This was all that was meant by the court, as is fully shown by the paragraph of the charge immediately preceding the criticised expression (Rec., p. 82), and the supposition that any other condition was intended is without warrant or foundation.

The Sixth Assignment.

The criticism made in this assignment of error is purely verbal. The plain meaning to be attached to the words used by the court was that in considering the alleged statements of the plaintiff, all of which were rebutted by his own denials and the testimony of others present in his house, the jury were to bear in mind that the mere fact that such statements were made would not necessarily establish *an intention to mislead.*

The jury were not told that the statements were not to be considered or that they were of no consequence, but only in effect that such statements were not to be taken as conclusive of the suggestion that plaintiff intended to perpetrate a fraud.

It is submitted that this was altogether just to the defendant and was not error.

As to the Seventh Assignment of Error.

By this assignment it seems to be claimed that the exception to or qualification of the rule that a plaintiff guilty of contributory negligence cannot recover was improperly applied to the case, because it is alleged that there was no evidence making the qualification applicable.

It is to be observed that the rule is inaccurately stated in the brief (page 21) for the plaintiffs in error. The rule is not as there stated, that the defendant must have had actual notice of the plaintiff's peril. It is sufficient if it would have known it by the use of due diligence. But perhaps this misstatement of the rule is of less importance in this case than the misrepresentation of the evidence involved in the statement on the same page of the brief that—"there is no tittle of evidence that the defendant knew the peril of the plaintiff," etc. Whatever the actual position of the plaintiff was, and whether it was perilous or otherwise, the defendant's agent, the pilot, who at the the time had charge and control of the movements of the boat, knew all about it, and was standing on the stern talking with plaintiff all the time the vessel was engaged in making the landing.

It is assumed as a fact in said brief (p. 22) that the plaintiff had placed his foot between the pile and the flooring and was standing in that position when the boat struck the wharf, and the conclusion is drawn that the defendant's agents had no notice or knowledge of this. The fact, as shown by the record, is that but one witness, the man Gibbon, introduced by defendant, locates the plaintiff in that position, and the witness was standing on the boat at the time in a less favorable position for observing him than that of the pilot in charge of the boat at the time.

Ennis, another witness introduced by defendant, who was on the boat at the time, locates plaintiff at a different place, as do all the other witnesses who testify in the case.

All the witnesses who saw him observed him from the boat, and the pilot saw him from the best possible point of observation, and if plaintiff's position was a dangerous one the pilot knew it, or should have known it, and, if possible, should have avoided the consequences of it. Now, all this was fairly and properly left to the jury; that is, whether the plaintiff was in a perilous position, and if so, whether the defendants' agents observed him there, and did all they reasonably could do to avoid the consequences of his exposed position. The assumption that there was no evidence justifying the submission of this question is overwhelmingly refuted by the facts in the record. It was said by this court in the case of The Washington and Georgetown Railroad Company *vs.* McDade (135 U. S., 571), that—

> As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially when the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences.

It is also said in plaintiffs' brief (p. 21) that "the defendant had a right to assume that an experienced wharfinger would, as the vessel approached, change his position and avoid the danger." The plain answer to this is that the plaintiff had no reason to anticipate, in the language of the learned justice who delivered the opinion of the court below in this cause, "that in effecting a landing in ordinary weather a steamer will [would] demolish the timbers of a wharf at which it stops [stopped] daily, and will [would] thereby imperil the lives or limbs of those who may happen to be within two or three feet of the fender piles."

In this connection it may be remarked that the learned counsel who tried the case before the jury for the defendant, did not himself believe the evidence of the witness Gibbon, to the effect that plaintiff placed his foot between the pile and the flooring, for when he put the question to

the supposed expert, as to whether the plaintiff's position was a dangerous one, he did not locate him by the question where Gibbon did, but where the other witnesses did, to wit, "*two or three feet from the fender piles.*" (Rec., p. 75).

It was also clear from the other evidence that Gibbon's theory or statement of the manner of the injury was necessarily erroneous. It was that Tolson, while standing with his right arm around a pile, thrust his left foot between that pile and the floor of the pier. This was a physically impossible position unless the pile was distant from the flooring at least five or six inches. That this was not the case was proved by both sides. Plaintiff testified that the piles "were jam up against the wharf; tight up against the wharf" (Rec., p. 18); and again, "those piles were fit so close to the wharf that Mr. Rogers dug the plank out, the last plank that fit into the piles, so that the piles set in with the plank in that way" (Rec., 19); and "this being the last board it was wedged up tight against the piles." (Rec., p. 20.)

And other witnesses for the defendant testified, "the lower corner pile was close up against the flooring of said pier, and the next upper front pier [pile] was one and a quarter inches from said flooring," according to measurements made more than three months after the accident. (Rec., p. 53.)

This physical fact disposed of Mr. Gibbon's theory.

The Eighth and Tenth Assignments of Error.

These two assignments involve the same question, to wit: *Upon whom is the burden of proving contributory negligence?*

This is not an open question in this court. Counsel for plaintiffs in error substantially admit this in their brief (p. 24). It is sought to take this case out of the general rule because plaintiff was injured while on a wharf constructed by himself, and it is suggested that the injury may

have occurred by reason of some "*insufficiency of the structure.*" (Brief of plaintiff in error, p. 25).

Admitting for argument's sake that it was the duty of plaintiff to maintain a reasonably safe wharf, if the defendant contends that the accident was caused by the insufficiency of the wharf, and not by the improper force of the boat in making the landing, why is not the burden upon the defendant to prove this as well as any other alleged act of contributory negligence? The plaintiff's evidence tended to prove that the wharf was a good, substantial and firm structure, built only about three months before the accident, and in every way suitable for the purpose of a wharf, at which all boats navigating the river stopped without injury to it up to the time of this occurrence. And there was no evidence from either side tending to show any "*insufficiency of the structure.*" (See description of wharf, brief of plaintiff in error, page 2.) Speaking of the character of the wharf as shown by the evidence, the court below in its opinion say, it "is proved to be strong and fit, and built for the express purpose of steamers stopping at and taking freight from [them] it." The first suggestion that there might be some defect about the wharf is found in the brief of counsel for plaintiffs in error. There is absolutely no evidence in the record having any such tendency.

THE NINTH ASSIGNMENT OF ERROR.

The question to the witness was properly excluded. The matter about which his opinion was asked was not a proper subject for expert testimony. The jury were as competent as the witness to answer the question.

Davis *vs.* The State, 38 Md., 38.

In many cases it is very much a matter of discretion to admit expert testimony, but the appellate court will not reverse in such case unless the ruling is manifestly erroneous.

Spring Co. *vs.* Edgar, 99 U. S., *a* 658.

Conclusion.

In conclusion, we submit that the case is free from error, and that the objections urged by counsel are hypercritical. But if the court should find verbal inaccuracy in some part of the instructions we submit we should receive the benefit of the rule so frequently applied by this court, that a judgment will not be reversed because a single instruction is technically erroneous, provided the instructions given, all taken together, fairly present the law on both sides to the jury, and present the whole case in a manner not calculated to mislead.

The whole scope and bearing of the charge is to be taken together.

It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context or without incorporating such qualifications and explanations as naturally flow from other parts of the instructions.

Spring Co. *vs.* Edgar, 99 U. S., *a* 659.
Evanston *vs.* Gunn, *Ibid.*, 660.
Castle *vs.* Bullard, 23 Howard, 172.

The judgment should be affirmed.

C. C. COLE,
A. A. BIRNEY,
Counsel for Defendant in Error.

APPENDIX.

Opinion of the Supreme Court of the District of Columbia in General Term.

Mr. Justice Merrick delivered the opinion of the Court:

This suit was brought to recover damages for crushing the foot of the plaintiff at a wharf on the Potomac River, in effecting a landing of the Steamer John W. Thompson in so negligent a manner that a portion of the wharf was torn up and broken, and the foot of the plaintiff was caught and crushed among the broken timbers. The plaintiff was the owner of the wharf and was in the habit of attending to the duties of a wharfinger.

Testimony was given of the situation and condition of the wharf, of the manner in which the boat landed and ought to have landed, and of the position of the plaintiff on the wharf at the moment of the accident and prior thereto and of all that was done and said on the occasion, and of the respective practice and duties of the steamboat officers, and of the plaintiff in effecting landings, and in taking off and putting freight on the steamer. As in most of such cases the testimony was contradictory as to the main facts, and as to whether the accident was occasioned by the negligence of the defendant's agents, by the fault of the plaintiff, or by the concurrent negligence of both parties.

In the progress of the cause several nautical men were examined in respect to the situation of the wharf in question, and as to the manner in which the approach to a wharf ought to be made, and how the particular landing was made, and as to the duties of a wharfinger, and then one of these mariners was asked if in his judgment a position

within two or three feet from the fender piles of a wharf constructed as was the Shamrock wharf, was a reasonably safe place for a wharfinger to stand when a boat was approaching in order to take off freight or to make a landing. Objection was made to the question, which was sustained by the court because the mariner was not shown to be a wharfinger, and to the refusal to admit the opinion of the witness the defendant excepted. Whether the answer would have been favorable or not to the defendant is not averred nor shown anywhere in the exception, and this court is therefore not advised by the record whether the defendant sustained any damage by the refusal of the court to allow the question. This defect in the statement would of itself be enough to justify the court in declining to award a new trial upon this exception. A party must show that he has in fact been prejudiced by a ruling before he can make it a ground of complaint on appeal.

But independently of that consideration we are of opinion that all the facts in the case being given, the jury were quite as capable as an expert of forming a correct opinion as to whether it was dangerous to stand upon a wharf when a boat was approaching to take off freight or to make a landing.

It is certainly is not matter of science or technical skill to determine whether it be an act of common prudence for a man to stand upon a wharf which is proved to be strong and fit and built for the express purpose of steamers stopping at and taking freight from them, and it does not require an expert to aid a jury in deciding whether any man, wharfinger or not, ought to anticipate that in effecting a landing in ordinary weather a steamer will demolish the timbers of a wharf at which it stops daily, and will thereby imperil the lives or limbs of those who may happen to be within two or three feet of the fender piles.

After all the testimony had been given the court granted the eight several instructions asked by the plaintiff and re-

fused the first, third, seventh, and eighth of the defendant, and granted the rest, with a modification of the fifth, which modification was admitted to be correct at the argument in this court.

The proper forms of instructing a jury upon the question of negligence have been so often under review in this court as well as in the appellate courts of different States and the Supreme Court, that we are spared the necessity of detailed criticisms. In the instructions which went to the jury, we think that the defendant had the benefit of every ruling to which he was entitled, and that the whole subject was fairly and fully put to jury in its proper application to the facts in evidence.

In rejecting the third prayer of the defendant the court was clearly right. After the plaintiff has proved negligence on the defendant's part he is entitled to rest, and the burden then falls on the defendant to prove want of ordinary care and prudence in the plaintiff, if he relies upon that as his defence.

The court was right in rejecting the defendant's seventh prayer because it asked the court to instruct the jury that for the defendant to put his foot between the piles of the pier and the flooring of the pier, or between one of the piles in front of the pier and the flooring, and to allow it to remain there while the boat was departing from the pier, was negligence in law, and that the plaintiff could not recover if such were his position. The question of negligence under such circumstances belonged exclusively to the jury.

The eighth prayer seems to have been framed with some view of presenting the proposition that if the plaintiff voluntarily assumed to perform some dangerous office as the servant of the defendant, and while so acting sustained an injury, he was not entitled to recover; but he does not in his prayer suggest that the injury was a consequence of his so acting or that by so acting he placed himself in a position of danger to which he would not otherwise have been ex-

posed. The concurrence of two things is widely different from the relation of two things to each other as cause and effect. In another aspect of the prayer it may have been meant to convey the idea that if the plaintiff voluntarily and knowingly placed himself in a situation of danger and by reason of so doing was injured he cannot recover. But regard the prayer in either way it is so defective in structure, so obscure and so calculated to mislead a jury that the court had no alternative but to reject it. Even were the prayer less objectionable in shape, there could hardly have been error in refusing it, as the court in the instructions which were granted gave the jury all that was really necessary for them to judge properly of the testimony, and in cases of this class it is the better practice to abstain from attempts to multiply distinctions when there is no substantial variation of the principles involved.

We have carefully compared the general charge of the trial justice with the criticisms made upon it by counsel in argument, but we have been unable to find any just ground of exception, and no good purpose would be subserved by a detailed examination of the objections which were made.

We shall, then, for the reasons we have given, affirm the judgment.

Supreme Court U.S.
FILED
DEC 23 1889
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 532.

THE INLAND AND SEABOARD COASTING COMPANY, Plaintiff in Error,

vs.

FRANCIS A. TOLSON.

BRIEF

In Behalf of Defendant in Error in Opposition to Motion to Rescind Judgment of Dismissal, and for Leave to Amend Writ of Error.

C. C. COLE,
A. A. BIRNEY,
Attorneys for Defendant in Error.

LAW REPORTER PRINT, 503 E ST.

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vs.
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} No. 532.

Brief in Behalf of Defendant in Error in Opposition to Motion to Rescind Judgment of Dismissal, and for Leave to Amend Writ of Error.

FIRST.

The judgment of the General Term of the court below is a joint judgment against the plaintiff in error, and its sureties in the undertaking on appeal. This Court has already so held in this cause. Prior decisions of this Court are to the same effect.

Estis *vs.* Trabue, 128 U. S., 229, and cases there cited.

There is nothing in the suggestion that there are two separate judgments, or judgments rendered upon two separate causes of action. It is a single judgment for money against all of the five defendants. It is rendered for the

cause of action stated in the declaration. The jury found that that cause of action was proved, and that the plaintiff had suffered $8,000 damages thereby, and the circuit court rendered judgment for that sum. By the undertaking for appeal to the General Term the sureties for the defendant below entered their appearance in and became parties defendant to this suit, and agreed that the judgment of the General Term, if it should be against the defendant below, upon the cause of action stated in the declaration, might be pronounced against them as well as the original defendant.

The object and effect of the rule is to save the necessity for a separate suit and judgment on the undertaking. After the signing of the undertaking by the sureties, they were as much parties to the suit, and subject to the jurisdiction of the General Term, as if they had been sued as joint tort feasors in the declaration, and the verdict found against them jointly with the original defendant. There is no proceeding upon the undertaking and can be none. Its purpose is accomplished by making the sureties parties to the suit for the purpose of the hearing in the General Term, and all subsequent proceedings, if its judgment should be against them.

It is said that the sureties have no day in court. But this is not so. The statute (motion and brief of plaintiff in error, p. 16), provides that the Court "may prescribe the terms and conditions upon which such appeals (from Special to General Term), may be made." The rule (p. 15 of same pamphlet), provides that no such appeal shall operate as a supersedeas unless an undertaking with sureties in effect like the one given in this cause, shall be given and approved by a judge of the court within a given time. By the terms of their appearance they espouse the cause of the appealing party, and join him in becoming actors in the General Term, and agree to pay the judgment if they cannot succeed in having it set aside. They have their day in

court and are heard in General Term as much as the party appealing, and therefore are entitled to a writ of error if the judgment is against them. If the plaintiff in error had declined to sue out a writ of error in this case there can be no doubt, under the decisions of this Court above referred to, but that the sureties, upon a summons and severance in the court below, could have done so.

The Court had Express Statutory Power to make the Rule, and it is Binding upon the Court and the Parties.

Bank *vs.* Oakely, 4 Wheat., 242.
Mills *vs.* Bank, 11 Wheat., 439.
Hiriart *vs.* Ballon, 9 Peters, 156.

In the case in 9 Peters, this Court construed a rule of the District Court for the district of Louisiana which provided that on the return of a mandate from this Court to that, summary judgment might be entered against principal and sureties on the appeal bond to this Court, on 10 days notice. In that case this was done, the sureties objecting on the ground that if liable at all the liability could only be enforced in a separate suit on the bond. Upon writ of error from this Court to that judgment, the same was affirmed. This Court held that the District Court had the power to make the rule, and that constituted the law regulating the remedy upon the bond. In that case it was said by Mr. Justice Story: "In becoming a security, he submitted himself to be governed by the fixed rules which regulate the practice of the Court."

It would also seem from the case last cited, as well as upon general principles of practice, that the questions of the power of the Court to make the rule, and whether it erred in entering the judgment in question against them, could only be examined by this Court upon a writ of error sued out by all the parties to the judgment.

SECOND.

The Motion for Leave to Amend.

The Objection to the Writ of Error is Jurisdictional, and it Cannot be Obviated by Amendment.

This Court in a recent case discussed the question of amendment of a writ of error, and clearly pointed out what defects could be cured by amendment and what not, holding that an objection exactly like the one urged to the writ in this case could not be cured by amendment.

Estis *vs.* Trabue, 128 U. S., 229.

It would seem that amendment is proper only in cases where the writ or appeal and accompanying papers, to wit, the bond or citation, clearly show that it was the intention of the plaintiff in error to join all the necessary parties in the writ or appeal. Where this appears, and the writ is defective in not setting forth the names of all the parties fully it may in the discretion of the Court be amended by the other papers referred to.

Owings *vs.* Kincannon, 7 Pet., 399.

Wilson *vs.* Insurance Company, 12 Peters, 140.

Estis *vs.* Trabue, *supra.*

In *Morris* vs. *Simonds* (100 U. S., 145) the appeal was taken in the name of a firm. But the supersedeas bond showed the names of the individual members of the firm and was executed by them. It was held that the appeal might be amended by the bond. In delivering the opinion of the Court Chief Justice Waite, referring to a case in 11 Wall., 82, which had been dismissed for a similar defect, said that, "it does not appear that the defect could have been remedied by reference to anything in the *appeal papers.*"

In the case of the Knickerbocker Ins. Co. *vs.* Pendleton,

while a part of the names of the plaintiffs below did not appear as defendants in the writ, they did appear as obligees in the supersedeas bond, and the amendment was made by that.

There is no case in this court, so far as we know, where a writ of error or appeal, defective in parties, has been amended, where there was nothing in the "*appeal papers,*" by which the amendment could be made.

The supersedeas bond and citation in this case have not been printed, but they follow the writ of error in the recital of the parties to the judgment below. There is, therefore, nothing by which the amendment can properly be made.

In this case it is clear that but one of the five defendants in the court below intended to sue out the writ of error, and there was no summons and severance. The judgment referred to in the writ, bond and citation, is said to be one in which Tolson is plaintiff and the plaintiff in error is defendant. But the judgment in the record sent up in return to the writ is a judgment against plaintiff in error and four others. Clearly the writ could not confer jurisdiction upon this Court to review the record of that judgment. To allow the insertion of the names of the other defendants below as plaintiffs in the present writ would be to make a new writ and not to amend the present one, and would necessitate a new bond and citation.

But if the Amendment be within the Discretion of the Court it Should not be Granted.

In Pearson *vs.* Yewdall (95 U. S., 294), this Court said:

"The right of a party to amend [a writ of error] is not absolute, but it is to be granted by the Court in its discretion. Whether it should be granted in a particular case must depend upon the attending circumstances." The

motion for leave to amend in that case was made in opposition to a motion to dismiss. The Court did not expressly decide that the defect in the writ was one which might be cured by amendment, but gave as the reason for granting the motion to dismiss in lieu of the one for leave to amend, that the record did not disclose any new question for argument and consideration.

Had the defect in the present writ been amendable, the proper course of the plaintiff in error, in order to have placed itself in position to ask the exercise of the discretion of the Court in favor of amendment, would seem to have been to have made this motion in opposition to the motion to dismiss, and to have caused the record to have been printed, that the Court might have looked into it for the purpose of ascertaining whether it is a case in which the discretion should be exercised in favor of amendment. That it did not do so, and has not yet done so, is equivalent to a confession that there is nothing in the record for this Court to review, and that the effort and object is to retain the case here for the purposes of vexation and delay. And this would conclusively appear if the Court could look into the record. It is an action on the case for a personal injury caused by the alleged negligence of the plaintiff in error, and the defenses are the usual ones of the denial of negligence on its part, and that the defendant in error was guilty of contributory negligence, and the bills of exceptions present none but the most familiar questions which have been repeatedly decided by this Court in recent as well as in older cases. This appears by the brief of attorney for plaintiff in error used at the hearing of the case in the General Term of the Court below published in 6 Mackey, 39, as well as from the opinion of the Court there reported.

C. C. Cole,
A. A. Birney,
Attorneys for defendant in error.

Office Supreme Court U. S.
FILED.
OCT 21 1889
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM.

THE INLAND & SEABOARD COASTING COMPANY, *Plaintiff in Error*,
vs.
FRANCIS A. TOLSON, *Defendant in Error*. } No. 532.

Now comes here the defendant in error, by Arthur A. Birney and Charles C. Cole, his attorneys, and moves the Court to dismiss the writ of error herein, because he says, that the judgment of the Supreme Court of the District of Columbia, in General Term, was rendered against the said The Inland and Seaboard Coasting Company, Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxtor jointly, as by reference to the transcript will appear, and the said Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter have not joined in said writ of error with the plaintiff in error.

ARTHUR A. BIRNEY,
CHARLES C. COLE,
Attorneys for Defendant in Error.

Judgment of Supreme Court, D. C.

IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

IN GENERAL TERM.

FRANCIS A. TOLSON, *Plaintiff*,
vs.
THE INLAND & SEABOARD COASTING COMPANY, *Defendant*. } AT LAW. No. 25,170.

Now again come here as well the plaintiff as the defendant by their respective attorneys, whereupon it appearing to the Court that the defendant's exceptions to the admissibility of evidence and to the rulings and instructions of the Court in Special Term were not well taken; and the defendant by its counsel having, in open Court, abandoned its various appeals and applications for new trial on other grounds, the motion for a new trial on exceptions is now overruled and the judgment of the Court in Special Term is affirmed with costs. And it is further adjudged that the plaintiff recover upon his said judgment, to wit, the sum of eight thousand dollars as of the date of the said judgment of the Special Term and the costs as well against the said defendant, and as against Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter, its sureties, on said appeal to this Court, and have execution against them and each of them.

By the Court:

E. F. BINGHAM,
Chief Justice.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Chief Justice and Justices of the Supreme Court of the District of Columbia, GREETING:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between Francis A. Tolson, plaintiff, and The Inland and Seaboard Coasting Company, defendant, being No. 25,170, at law, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Honorable Morrison R. Waite, Chief Justice of the United States, this 20th day of July, in the year of our Lord 1887, and of the Independence of the United States the one hundred and twelfth.

R. J. MEIGS, *Clerk.*

Citation.

DISTRICT OF COLUMBIA, *to wit:*

To Francis A. Tolson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the District of Columbia, wherein the Inland and Seaboard Coasting Company is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, E. F. Bingham, Chief Justice of the said Supreme Court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

Service acknowledged this 21st July, 1887.

BIRNEY & BIRNEY,
Attorneys for Defendant in Error.

Brief for Defendant in Error in Support of the Motion to Dismiss.

The judgment of the General Term is joint against the plaintiff in error and four other persons, and execution is awarded against all of them. The writ of error is brought by one only. The record shows no cause why Willard, Thompson, Baxter and Norment did not join in the writ of error, and no effort to have them do so.

"In a writ of error to a joint judgment against several, all must join. The omission of one or more is an irregularity for which the writ will be dismissed." This has been often held.

Hampton *vs.* Rouse, 13 Wall., 187.
Masterson *vs.* Herndon, 10 Wall., 416.
Simpson *vs.* Greeley, 20 Id., 152.
Feibelman *vs.* Packard et al., 108 U. S., 14.

This doctrine was again declared at the last term in a case exactly like the present—a judgment of a lower court against a principal defendant and sureties in an undertaking.

Estes *vs.* Trabue, 128 U. S., 225.

This is a defect which cannot be cured by amendment, and this Court has no jurisdiction to try the case. The writ should therefore be dismissed.

Estes *vs.* Trabue, 128 U. S., 225.
Heirs of Wilson *vs.* Ins. Co., 12 Peters, 140.
Hilton *vs.* Dickinson, 108 U. S., 165.

ARTHUR A. BIRNEY,
CHARLES C. COLE,
Attorneys for Defendant in Error.

Office Supreme Court U. S.
FILED.
MAR 19 1891
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the District of Columbia.

GENERAL TERM.

Reported in 6 Mackey, 39.

FRANCIS A. TOLSON

vs.

THE INLAND AND SEABOARD COASTING CO.

AT LAW. No. 25,170.

Motion for a new trial on bills of exception.

The case is stated in the opinion.

BIRNEY & BIRNEY and C. C. COLE, for plaintiff.

NATH'L WILSON, for defendant.

MR. JUSTICE MERRICK delivered the opinion of the Court.

This suit was brought to recover damages for crushing the foot of the defendant at a wharf on the Potomac River, in effecting a landing of the steamer John W. Thompson in so negligent a manner that a portion of the wharf was torn up and broken, and the foot of the plaintiff was caught and crushed among the broken timbers. The plaintiff was the owner of the wharf, and was in the habit of attending to the duties of a wharfinger.

Testimony was given of the situation and condition of the wharf, of the manner in which the boat landed and ought to have landed, and of the position of the plaintiff on the wharf at the moment of the accident and prior thereto, and of all that was done and said on the occasion, and of the respective practice and duties

the steamboat officers, and of the plaintiff in effecting landings and in taking off and putting freight on the steamer. As in most such cases the testimony was contradictory as to the main facts, and as to whether the accident was occasioned by the negligence of the defendant's agents, by the fault of the plaintiff, or by the concurrent negligence of both parties.

In the progress of the cause several nautical men were examined in respect to the situation of the wharf in question, and as to the manner in which the approach to a wharf ought to be made, and how the particular landing was made, and as to the duties of a wharfinger; and then one of these mariners was asked if, in his judgment, a position within two or three feet from the fender piles of a wharf constructed as was the Shamrock wharf was a reasonably safe place for a wharfinger to stand when a boat was approaching in order to take off freight or to make a landing. Objection was made to the question, which was sustained by the Court because the mariner was not shown to be a wharfinger; and to the refusal to admit the opinion of the witness the defendant excepted. Whether the answer would have been favorable or not to the defendant is not averred, nor shown anywhere in the exception, and this Court is therefore not advised by the record whether the defendant sustained any damage by the refusal of the Court to allow the question. This defect in the statement would of itself be enough to justify the Court in declining to award a new trial upon the exception. A party must show that he has in fact been prejudiced by a ruling before he can make it a ground of complaint on appeal.

But independently of that consideration we are of opinion that, all the facts in the case being given, the jury were quite as capable as an expert of forming a correct opinion as to whether it was dangerous to stand upon a wharf when a boat was approaching to take off freight or to make a landing. It certainly is not matter of science or technical skill to determine whether

it be an act of common prudence for a man to stand upon a wharf which is proved to be strong and fit and built for the express purpose of steamers stopping at and taking freight from them; and it does not require an expert to aid a jury in deciding whether any man, wharfinger or not, ought to anticipate that in effecting a landing in ordinary weather a steamer will demolish the timbers of a wharf at which it stops daily, and will thereby imperil the lives or limbs of those who may happen to be within two or three feet of the fender piles.

After all the testimony had been given, the Court granted the eight several instructions asked by the plaintiff and refused the first, third, seventh, and eighth of the defendant, and granted the rest, with a modification of the fifth, which modification was admitted to be correct at the argument in this Court.

The proper forms of instructing a jury upon the question of negligence have been so often under review in this Court, as well as in the Appellate Courts of different States and the Supreme Court, that we are spared the necessity of detailed criticism. In the instructions which went to the jury we think that the defendant had the benefit of every ruling to which he was entitled, and that the whole subject was fairly and fully put to the jury in its proper application to the facts in evidence.

In rejecting the third prayer of the defendant the Court was clearly right. After the plaintiff has proved negligence on the defendant's part he is entitled to rest, and the burden then falls on the defendant to prove want of ordinary care and prudence in the plaintiff if he relies upon that as his defense.

The Court was right in rejecting the defendant's seventh prayer, because it asked the Court to instruct the jury that for the defendant to put his foot between the piles of the pier and the flooring of the pier, or between one of the piles in front of the pier and the flooring, and to allow it to remain there while the boat was departing from the pier, was negligence in law, and